

**2009-2010**  
**NIAGARA INTERNATIONAL MOOT COURT COMPETITION**

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**A Dispute Arising Under the  
Statute of the International Court of Justice**

**February 2010**

**THE GOVERNMENT OF CANADA  
(Applicant)**

**v.**

**THE GOVERNMENT OF THE UNITED STATES  
(Respondent)**

**MEMORIAL OF THE RESPONDENT**

**TEAM#: 2010-06R**

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## **QUESTIONS PRESENTED**

- I. Did the “luring” of Canadian citizen Emanuel Rutaganda from Canada violate Canada’s territorial sovereignty, the U.S.-Canada Extradition Treaty, the January 11, 1988 Exchange of Letters Between Canada and the U.S. on Transborder Abduction, and/or the internationally protected human rights of Emanuel Rutaganda guaranteed by the International Covenant on Civil and Political Rights (ICCPR) and customary international law?
  
- II. Will the rendition of Emanuel Rutaganda from the U.S. to Rwanda for trial violate international law because: neither the U.S. nor Canada have an extradition treaty with Rwanda; as a child soldier Rutaganda lacked criminal culpability; and/or the courts of Rwanda are not capable of providing Rutaganda a fair trial?

## **JURISDICTIONAL STATEMENT**

Canada and the United States have agreed to submit this dispute to the International Court of Justice pursuant to article 40(1) of the Statute of the International Court of Justice (Statute) and in accordance with the Compromis notified to the Court on 24 October 2009. Pursuant to article 36(1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision.

Canada and the United States have agreed to act consistently with the Court's decision.

## STATEMENT OF FACTS

In 1993, Emanuel Rutaganda was recruited into the *Interhamwe* militia group, a paramilitary organization associated with the Hutu army. He continued to serve in the *Interhamwe* during the Rwandan genocide from April-August 1994. In June 1994, Rutaganda allegedly murdered 275 Tutsi Children at the Boutaire High School in Rwanda. The massacre is considered one of the worst atrocities of the 1994 genocide. Rutaganda was fifteen years old at the time. In August of that year, Rutaganda and his mother fled to Canada, and have remained there until the present time.

Since 2001, Rwanda has repeatedly requested that Canada surrender Rutaganda to face prosecution in Rwanda. Canada has consistently denied these requests. In 2002, INTERPOL issued a Red Notice seeking Rutaganda's arrest for murder during the course of the Rwandan genocide. Canada, again, refused to comply. In February 2009, pursuant to the Genocide Accountability Act of 2007, the U.S. government established the Inter-Agency Working Group for Human Rights Violators (Inter-Agency Working Group) in order to address INTERPOL and Rwanda's request for Rutaganda's arrest.

On July 21, 2009, U.S. Immigration and Customs Enforcement (ICE) agents notified the Inter-Agency Working Group that Rutaganda's mother was undergoing a specialized medical procedure at the Detroit Clinic's famed Cardiac Center. Given the location of Rutaganda's mother, the Inter-Agency Working group developed a plan, "Operation Motown Express," to "lure" Rutaganda onto U.S. soil. Under the Plan, ICE agents sent an email from the Detroit Clinic to Rutaganda's personal Blackberry requesting that he visit his mother at the Clinic right away. Shortly thereafter, Rutaganda entered the U.S. using a fraudulent Canadian passport and made his way to the Detroit Clinic. Upon arrival, Rutaganda was arrested and taken into custody

by ICE agents.

Once in U.S. custody, an order of removal was issued for Rutaganda. Canada was provided timely notice of the situation pursuant to the 2004 Canada-U.S. Consular Notification Agreement. Subsequently, through a series of immigration and judicial decisions, the U.S. affirmed that Rutaganda could be removed to Rwanda. Meanwhile, the Government of Canada vigorously protested the luring and apprehension of Rutaganda, as well as the U.S.'s decision to remove him to Rwanda. Additionally, the Prime Minister of Canada threatened to withdraw Canadian troops from Afghanistan in 2010 rather than 2011 as previously announced unless the U.S. agreed to refer the dispute over Rutaganda to the International Court of Justice. In hopes of seeking an amicable solution, the U.S. agreed to submit the case to this Court pursuant to article 36(1) of the Court's Statute.

## SUMMARY OF ARGUMENT

The luring of Rutaganda was consistent with the U.S.'s international obligations. Canada's territorial sovereignty was not violated because the U.S. actions constituted permissible luring rather than extraterritorial abduction. Even if luring were considered extraterritorial abduction, there is no customary international law that prohibits this practice. Moreover, the U.S. actions did not violate the Extradition Treaty or the Exchange of Letters because extradition was never requested and neither document explicitly prohibits transborder abduction.

Furthermore, the luring did not violate Rutaganda's internationally protected human rights. The ICCPR does not expressly include luring in its prohibition against "arbitrary arrest" and the international community has since failed to categorize luring as a violation of customary international human rights law. Even so, this Court should adopt the international law doctrines of *male captus bene detentus* and the "Eichmann exception." These doctrines allow the U.S. to maintain jurisdiction over Rutaganda due to the gravity and universal character of his offenses.

Finally, Rutaganda's rendition from the U.S. to Rwanda will not violate any rule of international law. The fact that there is no extradition treaty with Rwanda is irrelevant because the transfer is considered a sovereign act. Furthermore, Rutaganda's transfer is a legitimate "removal" pursuant to U.S. immigration procedures. Additionally, Rutaganda's status as a child soldier does not entitle him to impunity under international law because no treaty or customary international law prohibits the culpability or the prosecution of child soldiers. Finally, Rutaganda's removal should be permitted because the U.S.'s treaty obligations do not expressly prohibit removal of a criminal to a requesting state with a dubious judicial system, and the principle of complicity has not yet risen to the level of customary international law. Even so, the U.S. has legitimate grounds to believe that Rwanda is capable of providing Rutaganda a fair trial.

## ARGUMENT

### **I. The “luring” of Rutaganda from Canada did not violate international law.**

#### **A. Canada’s territorial sovereignty was not violated because the U.S. actions constituted permissible luring rather than extraterritorial abduction.**

Luring has been expressly permitted in the international court context. The controlling case is *Dokmanovic* in front of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>1</sup> Dokmanovic was a Croatian Serb who allegedly orchestrated the 1991 massacre of Croatian hospital patients. After his indictment, Dokmanovic fled from Croatia to the Federal Republic of Yugoslavia (FRY). An undercover agent of the ICTY’s Office of the Prosecutor met with Dokmanovic in the FRY and lured him into Croatia under false pretenses. There, on June 27, 1997, he was arrested. On Dokmanovic’s pretrial motion to dismiss, the ICTY Trial Chamber held that it had jurisdiction to hear the case because Dokmanovic was permissibly “lured” as opposed to “forcibly abducted.”<sup>2</sup> Here, the same distinction should be drawn. Rutaganda entered the U.S. of his own free will and was arrested on U.S. soil. Canada’s territorial sovereignty was not infringed.

While the *Dokmanovic* holding has received some criticism, it is based on a factor that is missing in the *Rutaganda* case—physical presence of the luring state in another state’s territory. Here, the luring of Rutaganda was conducted exclusively over email and mobile phone. No U.S. agent stepped foot onto Canadian territory. Thus, the luring of Rutaganda was acceptable and not a violation of Canada’s territorial sovereignty. The U.S. properly asserted jurisdiction over him.

Besides the ICTY, other courts, both international and domestic, have supported the

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<sup>1</sup> Prosecutor v. Slavko Dokmanovic, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic (Oct. 22, 1997).

<sup>2</sup> *Id.*

legitimacy of luring. In *Stocke v. Germany*, the European Court of Human Rights held that no violation of international law had occurred when the accused was lured onto a plane that unexpectedly landed in German territory so that he could be arrested.<sup>3</sup> Furthermore, the English House of Lords came to a similar conclusion in *In re Schmidt*, allowing jurisdiction over the accused because he was “tricked” into coming to England rather than “coerced.”<sup>4</sup> Also, the United States D.C. Circuit in the *Yunis* case concluded that jurisdiction was properly asserted over the accused, a Lebanese national, who was lured into and arrested on international waters.<sup>5</sup>

**B. No customary international law rule exists that prohibits extraterritorial abduction.**

The *Lotus* principle holds that States may act in any manner they wish provided their actions do not contravene an express prohibition of international law.<sup>6</sup> Customary international law, which is an article 38(1)(b) source of international law under the ICJ Statute, is a set of rules derived from the “common consent of mankind” and “acquiesced in as of general obligation.”<sup>7</sup> A customary international rule requires the showing of (a) State practice, or widespread repetition by States over time and (b) *opinio juris*, or sense of legal obligation.<sup>8</sup> Here, Canada cannot prove these elements of a customary international law rule forbidding extraterritorial abduction.

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<sup>3</sup> *Stocké v. Germany*, 13 Eur. H.R. Rep. 839, 842, 851-52 (Eur. Ct. H.R. 1991).

<sup>4</sup> *In re Schmidt*, (1995) 1 A.C. 339, 359 (H.L.) (appeal taken from Eng.) (Sedley, J.) (U.K.).

<sup>5</sup> *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

<sup>6</sup> The S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

<sup>7</sup> *The Paquete Habana*, 175 U.S. 677, 711 (1900).

<sup>8</sup> MARK JANIS & JOHN NOYES, *INTERNATIONAL LAW CASES: AND COMMENTARY* 101 (3d ed. 2006).

First, the examples of State practice that Canada would point to are not widespread or consistent enough to demonstrate a crystallized customary international law rule against extraterritorial abduction. The U.S. has a string of domestic case law with holdings to the effect that extraterritorial abduction allows for jurisdiction over a defendant.<sup>9</sup> The U.S., a political and economic world superpower, has surely not subscribed to a prohibition against extraterritorial abduction. Furthermore, Israel in its State practice has shown that it approves of extraterritorial abduction as a method for obtaining jurisdiction. In *Att'y Gen. of Israel v. Eichmann*, Israeli agents kidnapped the defendant in Argentina and charged him with war crimes. The Israeli court maintained jurisdiction over him.<sup>10</sup> Additionally, a German court in 1986 held that no customary rule of international law prevented jurisdiction over extraterritorial abduction.<sup>11</sup> Since multiple States approve of and practice extraterritorial abduction, Canada simply cannot meet its burden in showing widespread and repeated State practice in prohibiting the use of extraterritorial abduction.

Second, Canada cannot meet its burden in showing *opinio juris*, or a legal obligation on the part of States to comply with an international prohibition on extraterritorial abduction. *Opinio juris* is best demonstrated by diplomatic relations, practices of international organizations, and State laws and decisions.<sup>12</sup> If anything, these evidentiary means show that no legal obligation

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<sup>9</sup> See *United States v. Alvarez-Machain* 504 U.S. 655 (1992); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *Ker v. Illinois*, 119 U.S. 436 (1866); *Frisbie v. Collins*, 342 U.S. 519 (1952).

<sup>10</sup> *Att'y Gen. v. Eichmann*, 36 I.L.R. 18, 63 (Isr. Dist. Ct. 1961).

<sup>11</sup> 39 *Neue Juristische Wochenschrift* 1427 (1986) (Ger. Fed. Const. Ct. 1985).

<sup>12</sup> Gregory S. McNeal & Brian J. Field, *Snatch-And-Grab Ops: Justifying Extraterritorial Abduction*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 491, 501-508 (2007).

exists. UN Security Council Resolution 1373 explicitly “denies terrorist-sponsoring states the ability to prosecute their nationals domestically.”<sup>13</sup> To extrapolate, this resolution implicitly states that since a terrorist-sponsoring state cannot try its terrorists, other states may, in response to a terrorist attack, extraterritorially abduct a perpetrator in order to try him or her. Thus, not only is there no UN document that explicitly prohibits extraterritorial abduction, there is one that tacitly endorses it. Furthermore, as for domestic laws and decisions, none exist which condemn extraterritorial abduction by applying international law. Cases that dismissed jurisdiction over an abducted defendant, such as *Ex Parte Bennett* in England and *South Africa v. Ebrahim*, were based on their own nations’ customs and laws.<sup>14</sup> They were “not based on a belief of how the international community should operate.”<sup>15</sup> Thus, there is no *opinio juris* and no customary international law rule that Rutaganda’s luring could have violated.

**C. The luring of Rutaganda did not violate the U.S.-Canada Extradition Treaty or the Exchange of Letters of 1988.**

While the U.S.-Canada Extradition Treaty<sup>16</sup> does set out the procedure for granting or denying an extradition between the two states, it is only applicable once an extradition has been requested. The U.S. never requested the extradition of Rutaganda and was, therefore, never denied a request by Canada.<sup>17</sup> Thus, the Extradition Treaty does not apply to the luring of Rutaganda because he was never “extradited” under its provisions.

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<sup>13</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>14</sup> *Ex Parte Bennett*, [1994] 1 A.C. 42 (1993) (appeal taken from QB)(U.K.); *South Africa v. Ebrahim* 1991 (2) SA 553 (S. Afr.).

<sup>15</sup> McNeal and Field, *supra* note 12 at 517.

<sup>16</sup> Treaty on Extradition, Can.-U.S., Dec. 3, 1971, 27 U.S.T. 983.

<sup>17</sup> *See Compromis*, ¶¶ 5-9.

Furthermore, according to Vienna Convention on the Law of Treaties, which is binding upon the U.S. and Canada under customary international law, the Extradition Treaty should be interpreted according to the “ordinary meaning” of its terms.<sup>18</sup> The terms of the Treaty do not explicitly prohibit luring, and therefore the practice should not be condemned. In this regard, the U.S.-Canada Extradition Treaty is similar to the U.S.-Mexico Extradition Treaty that the U.S. Supreme Court interpreted in *Alvarez-Machain*. The Court allowed for jurisdiction over the abducted defendant, holding “the absence of provisions covering abductions to be an implicit approval of such abductions.”<sup>19</sup> This was affirmed in the *Kasi* decision.<sup>20</sup> In that case, the Supreme Court of Virginia asserted jurisdiction over the defendant, who was abducted from Pakistan by U.S. agents in spite of an existing extradition treaty. Here, much like in *Alvarez-Machain* and *Kasi*, the U.S.-Canada Extradition Treaty does not mention luring. Thus, the Treaty implicitly approves of luring, the method by which Rutaganda was detained.

Furthermore, the Jan. 11, 1988 Exchange of Letters on Transborder Abduction provides further context for the interpretation of the U.S.-Canada Extradition Treaty.<sup>21</sup> The understanding creates no rights or duties for either government, but it does express the U.S.’s intent to cooperate in extraditing “bounty hunters” who commit transborder abductions of persons from Canadian territory. This suggests that the topic of transborder abduction is outside the scope of the Treaty, since an Exchange of Letters is needed to address it. The Exchange of Letters expressly punishes only private civilians who conduct transborder abductions. Thus, the

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<sup>18</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

<sup>19</sup> *Alvarez-Machain*, *supra* note 9 at 664; *see also* McNeal and Field, *supra* note 12 at 507.

<sup>20</sup> *Kasi v. Com.*, 256 Va. 407, 508 S.E.2d 57 (1998).

<sup>21</sup> *See* Exchange of Letters, Can.-U.S. (Jan. 11, 1988).

“ordinary meaning” interpretation of the Exchange of Letters is that, as opposed to *private* abductions, *government* conducted abductions are permitted. If Canada and the U.S. had wanted to outlaw governments from conducting abductions, or luring for that matter, the Exchange of Letters could have easily included such language.

Finally, timing is everything. At the time of the Exchange of Letters, both the U.S. and Canada had been aware for more than 30 years of the U.S.’s *Ker-Frisbie* doctrine, which states that a court can exercise jurisdiction over an accused without regarding the manner in which his physical presence in the court’s jurisdiction was attained.<sup>22</sup> The *Ker-Frisbie* doctrine is the basis for the holdings in *Alvarez-Machain* and *Kasi*. Furthermore, Canada has had ample time since 1988 to ask for a change in the terms of the Extradition Treaty. Canada has been aware of the holding of *Alvarez-Machain* since 1992, which allows the U.S. to conduct extraterritorial abductions unless expressly prohibited in an Extradition Treaty.<sup>23</sup> Here, it is simply too late for Canada to rely upon the limited terms of the Treaty and plead ignorance to U.S. policy.

**D. The luring did not violate the internationally protected human rights of Rutaganda.**

The U.S. did not breach its treaty obligation under the ICCPR. Article 9(1) states: “No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>24</sup> Article 9(1) does not explicitly define “arbitrary arrest or detention” to include luring. This is in stark contrast to “torture,” for instance, which is prohibited in article 7 of the ICCPR and then

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<sup>22</sup> See *Ker v. Illinois*, 119 U.S. 436 (1866); *Frisbie v. Collins*, 342 U.S. 519 (1952).

<sup>23</sup> See *Alvarez-Machain*, *supra* note 9 at 664.

<sup>24</sup> International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

fully defined in a later treaty, the U.N. Torture Convention.<sup>25</sup> Since the ICCPR's adoption there has been no binding treaty law or customary international law that states that luring constitutes arbitrary arrest under article 9(1). Therefore, according to the *Lotus* principle, since luring has not been prohibited as a violation of article 9(1), it should be permitted.

The best indicator that the international community has not condemned luring as a violation of the ICCPR or customary international human rights law is the fact that only 21 co-sponsoring states proposed a General Assembly resolution asking the ICJ for an advisory opinion on the question of “conformity with international law of certain acts involving the extraterritorial exercise of coercive power of a State and the subsequent exercise of criminal jurisdiction.”<sup>26</sup>

Furthermore, the facts of *Rutaganda* indicate that his arrest and detention were not arbitrary. Rutaganda entered the U.S. with a fraudulent passport and of his own free will. He was arrested on grounds and in accordance with procedure established by U.S. law. In accordance with the 2004 US-Canada Consular Notification Agreement, the US notified Canadian consulate as soon as the arrest took place. Furthermore, Rutaganda's treatment and trial complied with U.S. due process requirements.<sup>27</sup>

**E. This Court should adopt the doctrines of *male captus bene detentus* and the “Eichmann exception.”**

Even if the luring were considered a violation of Rutaganda's internationally protected

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<sup>25</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

<sup>26</sup> U.N. Doc. A/47/247, annex (1992).

<sup>27</sup> *Compromis*, ¶ 10.

human rights, the international law doctrine of *male captus bene detentus*,<sup>28</sup> literally “improperly captured, properly detained,” would still give the U.S. jurisdiction to try Rutaganda.

In the U.S., the controlling precedents are *Alvarez-Machain*, *Ker*, and *Frisbie*, all of which allowed for jurisdiction over defendants who were forcibly abducted. The *Yunis* case allowed for jurisdiction over a defendant who had been lured from a foreign state. The only exception in U.S. case law to the hard-line rule that a court should maintain jurisdiction over an abducted defendant is found in *Toscanino*, which states that a case should be dismissed only if the government’s actions in obtaining the defendant were “outrageous” and “shocked the conscience.”<sup>29</sup> Here, the government’s actions do not rise to that level. Rutaganda was lured by the U.S. intelligence community, not abducted. However, as decided by this Court in *Ex parte U.S. v. Swain*, Rutaganda was not subject to positive international human rights law, and his extradition to the U.S. should be maintained.

Besides the U.S. courts, international courts and tribunals have upheld the customary international law doctrine of *male captus bene detentus*. Transborder abduction cases at the ICTY (*Todorovic* and *Nikolic*), the International Criminal Court (*Lubanga*) and the Extraordinary Chambers in the Courts of Cambodia (*Duch*) have all rejected the defense’s motion to dismiss based on abuse of process.<sup>30</sup> This means there are very limited circumstances under which an international court or tribunal can dismiss due to an abducted defendant. More

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<sup>28</sup> Jonathan A. Bush, *How Did We Get Here? Foreign Abductions After Alvarez-Machain*, 45 STAN. L. REV. 939, 952 (1993).

<sup>29</sup> *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir. 1974).

<sup>30</sup> *See* Prosecutor v. Simic, Case No. IT-95-9, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others (Oct. 18, 2000) [hereinafter *Todorovic*]; Prosecutor v. Nikolic, Case No. IT-94-2-PT, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, (Oct. 9, 2002); Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the Appeal of Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court, (Dec. 14, 2006); Extraordinary Chambers in the Courts of Cambodia, Order of Provisional Detention, Investigation No. 001/18-07-2007 [hereinafter *Duch*].

particularly, the *Duch* court, relying upon *Nikolic* and *Lubanga*, explicitly required a showing of grave rights violations to justify the dismissal of the case.”<sup>31</sup> Thus, *Duch* laid out a balancing test for *male captus* between the extraordinary nature of the crime charged and the illegal conditions of detention. Here, even if luring violated Rutaganda’s internationally protected rights, it would still not outweigh the gravity of 275 murder charges.

Furthermore, this Court’s analysis of the “Eichmann exception” should allow for U.S. jurisdiction over Rutaganda. An “Eichmann exception,” derived from the *Eichmann* trial in front of the Israeli Supreme Court, would allow for a fugitive’s abduction to be “decoupled” from his subsequent trial in the case of “universally condemned offenses.”<sup>32</sup> Here, Rutaganda was arrested pursuant to a plan by the Inter-Agency Working Group, which was created by the Genocide Accountability Act of 2007. He is charged with “275 counts of murder . . . in the course of the 1994 Rwandan Genocide.”<sup>33</sup> He is a perpetrator of crimes that could accurately be characterized as war crimes, crimes against humanity, and genocide. War crimes are “violations of the laws or customs of war,” which include “wilful killing . . . not justified by military necessity and carried out unlawfully and wantonly.”<sup>34</sup> Crimes against humanity are crimes committed in armed conflict, directed at a civilian population, and part of a widespread or

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<sup>31</sup> *Duch*, ¶¶ 18-19, 21.

<sup>32</sup> Michael Scharf, *The Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY*, 11 LEIDEN J. INT’L L. 369, 381 (1998).

<sup>33</sup> See 18 U.S.C. §1091; INTERPOL Red Notice (Jan. 6, 2002).

<sup>34</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 UNTS 287.

systematic practice.<sup>35</sup> Genocide includes killing with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>36</sup> Genocide, war crimes, and crimes against humanity have all been characterized as crimes that allow for universal jurisdiction, meaning that any state has jurisdiction to define and prescribe punishment.<sup>37</sup> Thus, Rutaganda’s offenses are of a distinctly serious and international character, much like the offenses committed by Eichmann. This Court should invoke an “Eichmann exception,” permitting jurisdiction to be maintained over Rutaganda despite the conditions of his arrest.

## **II. RUTAGANDA’S RENDITION FROM THE UNITED STATES TO RWANDA WILL NOT VIOLATE INTERNATIONAL LAW**

### **A. Transferring Rutaganda to Rwanda without an extradition treaty is not a violation of international law because extradition is a sovereign act.**

The U.S. will not violate international law if it “removes” Rutaganda in the absence of a treaty because no prohibitive international law exists. As the *Lotus* principle provides,<sup>38</sup> States may act in any manner they wish provided their actions do not contravene an express prohibition. Extradition is considered by States to be a sovereign act, not one controlled by any singular international standard. Some States will and have extradited on the basis of reciprocity, comity, and even *ad hoc* arrangements where no extradition treaty exists.<sup>39</sup> Ultimately, it is a State’s

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<sup>35</sup> Rome Statute of the International Criminal Court art. 7, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90.

<sup>36</sup> Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>37</sup> Restatement (Third) of Foreign Relations Law of the United States § 404 (1987).

<sup>38</sup> *Lotus*, *supra* note 6.

<sup>39</sup> M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 25 (5th ed. 2007).

own policy or national legislation that determines the scope of its extradition power. Thus, the absence of an extradition treaty between the U.S. and Rwanda is no barrier under international law to Rutaganda's extradition.

One factor militating against asylum is when the individual has committed an international crime. Even the U.S., which by virtue of its own laws does not generally extradite without a treaty, has extradited in the past in the absence of a treaty when the crime involved was of an international character. Perhaps the most well known case is that of *Arguelles*.<sup>40</sup> Although no extradition treaty existed between the U.S. and Spain, the U.S. extradited Arguelles, an officer in the Spanish Army, who had been accused in Spain of selling individuals into slavery. As stated by the U.S. Secretary of State at the time, the U.S. granted Spain's request on the basis of comity because "a nation is never bound to furnish asylum to dangerous criminals who are offenders against the human race."<sup>41</sup>

In the present case, Rutaganda is accused of murdering 275 children during the Boutaire High School massacre, considered one of the worst atrocities of the 1994 Rwandan genocide.<sup>42</sup> While Rwanda has charged Rutaganda with murder, his actions can aptly be characterized as war crimes, crimes against humanity, and/or genocide. Thus, due to the international character of these crimes and U.S. precedent, the U.S. is not estopped even by virtue of its internal laws from extraditing Rutaganda to Rwanda.

Yet, even if extradition is unavailable, Rutaganda can still be "removed" from the U.S.

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<sup>40</sup> JOHN BASSETT MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 33-34 (1891).

<sup>41</sup> Bassiouni, *supra* note 39, at 94-5.

<sup>42</sup> Compromis, ¶ 4.

pursuant to immigration procedures, which require no bilateral treaty between the requested and requesting countries. Extradition is not the only way to transfer a suspected criminal, and countries around the world have routinely utilized deportation as a means of removing and transferring individuals to other countries when extradition is either unavailable or undesirable.<sup>43</sup> Immigration procedures, like extradition, are sovereign acts, and States retain ultimate control over who enters and remains within its borders. Classic examples include the deportation of Nazi war criminals<sup>44</sup> and more recently, terrorist suspects.<sup>45</sup> A prime illustration in the U.S. of deportation as an alternative rendition device is found in the *Matter of Doherty*.<sup>46</sup> In this case, the U.S. sought to extradite an Irish national for his participation in a Provisional Irish Republic Army killing of a British Army captain. The U.S. declined to extradite based upon the Political Offense Exception contained in the bilateral extradition treaty; however, the U.S. successfully deported Doherty to the United Kingdom instead. This was done despite Doherty's objection and designation of Ireland as his country of choice for deportation.

Once Rutaganda entered the U.S. and was taken into custody by ICE agents, the U.S. had the sovereign right to "remove" Rutaganda according to its own immigration procedures. U.S. immigration law gives the alien the right to select the country where he will be deported, unless that selection is prejudicial to the interests of the U.S.<sup>47</sup> Given the U.S.'s desire to combat

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<sup>43</sup> Bassiouni, *supra* note 39, at 214.

<sup>44</sup> Robert A. Cohen, Note, *United States Exclusion and Deportation of Nazi War Criminals: The Acts of October 30, 1978*, 13 N.Y.U. J. INT'L L & POL. 101 (1980).

<sup>45</sup> Bassiouni, *supra* note 39 at 215-6.

<sup>46</sup> *Matter of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); *See also* McMullen v. United States, 989 F.2d 603 (2d Cir. 1993).

<sup>47</sup> 8 U.S.C. § 1231 (b)(2)(C)(iv) (2000).

international crime and the impunity that would await Rutaganda in Canada, deporting him to Canada is most certainly prejudicial to U.S. interests. Additionally, removal to Rwanda would not violate Rutaganda's human rights under article 13(2) of the Universal Declaration of Human Rights<sup>48</sup> or article 12(4) of the ICCPR.<sup>49</sup> The right to travel and return freely to one's own country is premised on the underlying assumption that the individual has not committed a crime that would limit these rights.<sup>50</sup> Moreover, the deprivation of Rutaganda's right to return to Canada is not "arbitrary" under article 12(4) of the ICCPR when he is wanted for 275 counts of murder and/or international crimes.

The lack of any prohibitive international law on extradition or deportation leaves these devices under the sovereign control of each country. Canada may argue that the U.S. will violate its own extradition law by extraditing Rutaganda to Rwanda, but as *Arguelles* illustrates, the history of U.S. extradition law is riddled with exceptions. Moreover, the ICJ is not the forum to debate violations of U.S. law. Yet even if extradition is unavailable, the coup de grâce to Canada's argument is that the U.S. also has the sovereign right to use immigration procedures to "remove" Rutaganda to Rwanda. Deportation is a device the U.S. and countries around the world routinely rely upon, and as illustrated above, the removal of Rutaganda to Rwanda is hardly arbitrary given Rutaganda's status as an international fugitive.

#### **B. Rutaganda's status as a child soldier does not entitle him to impunity under international law**

The U.S. will not violate international law by removing Rutaganda to face trial in Rwanda because international law centers on the recruitment of children and lacks any express

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<sup>48</sup> Universal Declaration of Human Rights art. 13(2), Dec. 10, 1948, U.N.G.A. Res. 217 A (III).

<sup>49</sup> ICCPR, *supra* note 24.

<sup>50</sup> *See* Universal Declaration of Human Rights, *supra* note 48 at art. 29(2).

prohibition on the *culpability* of child soldiers. While Canada considers child soldiers to be victims and therefore absolved of culpability, this is not what international law currently provides. Despite what one's opinion may be as to the reprehensibility of child soldiers in general, it is the responsibility of this Court "not to confuse the international law we have with the international law we need."<sup>51</sup>

As the facts specify, Rutaganda served in the *Interhamwe* militia group at 15 and is alleged to have committed 275 counts of murder.<sup>52</sup> According to the Convention on the Rights of the Child,<sup>53</sup> Additional Protocol I to the Geneva Conventions,<sup>54</sup> and the Rome Statute of the International Criminal Court (ICC),<sup>55</sup> 15 is the minimum age at which children can legally serve as soldiers. Additional Protocol I holds that States should take "all feasible measures" to prevent children from participating in direct hostilities. Convention on the Rights of the Child commentary states that this is not a complete ban on the use of children in armed combat.<sup>56</sup>

In 2002, the Optional Protocol on the Involvement of Children in Armed Conflict came into force. This multilateral treaty stipulates that State parties "shall take all feasible measures to ensure that persons below the age of 18 do not take a direct part in hostilities and that they are

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<sup>51</sup> The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8) (separate opinion of Judge Schwebel).

<sup>52</sup> *Compromis*, ¶¶ 2, 4.

<sup>53</sup> Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>54</sup> Additional Protocol I to the Geneva Convention art. 77(2), Dec. 7, 1978, 1125 U.N.T.S. 3.

<sup>55</sup> Rome Statute, *supra* note 35.

<sup>56</sup> International Committee of the Red Cross, *Convention on the Rights of the Child Commentary on Additional Protocol I to the Geneva Convention*, <http://www.icrc.org/ihl.nsf/COM/470-750099?OpenDocument>.

not compulsorily recruited into their armed forces.”<sup>57</sup> While it cannot be said that the age of 18 has crystallized into customary international law, given that substantial State practice continues to show the use of child soldiers below 18, the U.S., Canada, and Rwanda are parties to the Optional Protocol. Canada may seize upon this international obligation in arguing that at age 15, Rutaganda lacked criminal culpability. However, this argument confuses what international law provides. A close examination of the language of the Optional Protocol and all of the preceding instruments that provide protection for child soldiers shows that the focal point of international law is on prohibiting the recruitment of children, not the culpability of children.

None of the legal instruments addressing children in armed conflict expressly prohibit the prosecution of children. From a policy standpoint, focusing on the recruiters of child soldiers makes sense as these are the individuals primarily responsible for a child’s involvement in an armed conflict. To absolve all children who commit war crimes of any responsibility is problematic for two reasons: first, this may lead to more human rights violations as commanders may order children to commit more crimes given their immunity, and secondly, not all children are forced to commit crimes and to not punish those that understand their actions eliminates a critical deterrent. A wholesale ban on the prosecution of child soldiers is ill advised, and it comes as no surprise that international law leaves it to the sovereign discretion of states as to how to punish adolescent criminal conduct. The most that can be said about prosecutorial limitations is that the punishment of child soldiers should be geared toward their rehabilitation

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<sup>57</sup>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, G.A. Res. 54/263, U.N. Doc. A/RES/54/263.

and reintegration into society.<sup>58</sup> However, not only is this not a binding obligation, but also the issue of sentencing is appropriately left to the national courts, not the ICJ.

Further evidence that international law does not prohibit the prosecution of child soldiers can be found in the Statute of the Special Court for Sierra Leone (SCSL). Thousands of children fought in the civil war in Sierra Leone and the issue of whether these children could be prosecuted was directly considered during the Statute's drafting. Whereas the statutes of the ICTY and ICTR do not include any provisions governing the age of criminal culpability, article 7 of the SCSL Statute expressly grants the Court jurisdiction over persons aged 15 and older.<sup>59</sup> While David Crane, the former SCSL lead prosecutor, stated that he did not intend to prosecute any children,<sup>60</sup> this was a decision grounded in policy, not international law. A similar conclusion can be drawn from the Rome Statute, which grants the ICC jurisdiction only over those 18 and older. It is clear from the language of article 26 and its drafting history that this provision is procedural rather than substantive.<sup>61</sup> The ICC excluded its jurisdiction in order to leave the treatment of child war criminals to the national courts. Thus, any decision by the SCSL and ICC not to prosecute child soldiers is not a reflection of international law.

Given international law's focus on preventing the recruitment of child soldiers and the absence of any prohibition on their criminal culpability, prosecuting Rutaganda presents no

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<sup>58</sup> The Paris Principles and Guidelines on Children Associated With Armed Forces or Armed Groups, Feb. 2007, *available at* [http://www.un.org/children/conflict/\\_documents/parisprinciples/ParisPrinciples\\_EN.pdf](http://www.un.org/children/conflict/_documents/parisprinciples/ParisPrinciples_EN.pdf).

<sup>59</sup> S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000).

<sup>60</sup> Press Release, Special Court for Sierra Leone, Special Court Prosecutor Says He Will Not Prosecute Children (Nov. 2, 2002).

<sup>61</sup> R.S. CLARK & O. TRIFFTERER, *Article 26: Exclusion of Jurisdiction Over Persons Under Eighteen*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 499 (O. Triffterer ed., 1999).

violation. The U.S. will in no way violate international law by removing Rutaganda to Rwanda.

**C. The U.S. will not violate international law by transferring Rutaganda to Rwanda given the status of the Rwandan national courts**

The question before this Court is not whether Rwandan courts can provide a fair trial, but whether the U.S. is forbidden from transferring Rutaganda to Rwanda if they cannot provide a fair trial. As established in Section A *supra*, extradition and/or deportation are sovereign acts, and therefore, the decision to transfer an individual to a requesting State lies within the sole discretion of the requested State. The fact that the ICTR and a number of other countries have chosen not to transfer or extradite cases or criminals to Rwanda has no bearing on the U.S. Each of these entities made a discretionary decision just as the U.S. has the sovereign right to do. Canada's only plausible argument is that the U.S. will violate one of its own international obligations. This argument, however, is without merit given the facts of this case.

The right to a fair trial is enshrined in article 14 of the ICCPR, which states that among other things, "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."<sup>62</sup> As a party to this Covenant, the U.S. has an obligation to provide individuals within the U.S. a fair trial. What the Covenant does not stipulate, however, is that parties must ensure that other countries also provide individuals with a fair trial. This is a significant omission. For example, article 3(1) of the Torture Convention stipulates that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>63</sup> If the U.S. had substantial reason to believe that Rutaganda would be tortured upon returning to Rwanda, the U.S. would violate its obligations under the Torture

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<sup>62</sup> ICCPR, *supra* note 24 at art. 14.

<sup>63</sup> Torture Convention, *supra* note 25 at art. 3(1).

Convention if it removed Rutaganda to Rwanda. Conversely, the ICCPR says nothing about removing criminals to other countries where they may not face a fair trial. In fact, the *travaux preparatoires* reveal that during the drafting of the Covenant a proposal to include a provision addressing extradition was expressly rejected.<sup>64</sup>

Canada may also argue that even if the ICCPR doesn't expressly prohibit removal of a criminal to a requesting state with a dubious judicial system, the principle of complicity would prohibit removal. This principle is a "secondary" or "derivative" form of state responsibility, which targets States that aid or assist others in violating international law. It can be found in the International Law Commission's (ILC) Draft Articles on State Responsibility, which represent the first attempt to codify complicity in connection with the law regulating inter-state relations. Any suggestion that Rutaganda's removal will violate international law by virtue of complicity fails for two reasons: first, the principle of complicity is not customary international law and therefore not binding on the U.S., and secondly, even if the U.S. is bound, its actions do not rise to complicit behavior under the Draft Articles.

According to article 16 of the Draft Articles, a State violates international law if it knowingly "aids or assists another [S]tate in the commission of an internationally wrongful act."<sup>65</sup> Removing Rutaganda to Rwanda does not meet this definition because the U.S. is not knowingly aiding or assisting Rwanda in providing an unfair trial. In fact, the U.S. has legitimate grounds for believing that Rwanda *is* capable of providing a fair trial. For example, in 2003 Rwanda passed a new constitution which made a number of significant changes to its

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<sup>64</sup> MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (Martinus Nijhoff ed., 1987).

<sup>65</sup> International Law Commission, Articles on State Responsibility art. 16, Dec. 12, 2002, U.N.G.A. Res. 56/83.

judicial system. Most notably, the constitution is premised on the ICCPR, which Rwanda is a party to. The Rwandan judiciary's independence and impartiality, which had been criticized before, was no longer considered an obstacle by the ICTR Appeals Chamber.<sup>66</sup> The ICTR's remaining concern has dealt primarily with the protection of witnesses, but Rwanda passed legislation in early 2009 making it easier for the accused to call witnesses, particularly through the use of video link.<sup>67</sup> According to the text of article 14(3)(e) of the ICCPR, the defense does not have an unlimited right to obtain the compulsory attendance of witnesses on the defendant's behalf, but only "under the same conditions" as the prosecution.<sup>68</sup> There is no reason to believe that the Rwandan judiciary is incapable of providing for this.

Yet given the precise prayer for relief in this case,<sup>69</sup> the U.S. and Canada need not agree on every aspect of the Rwandan judiciary's capability. The issue is whether the U.S. will violate international law in transferring Rutaganda to Rwanda. Not only does the U.S. have reasonable grounds for believing that Rwanda is capable of providing a fair trial, but also there is no international obligation the U.S. will circumvent in removing Rutaganda to Rwanda.

### **CONCLUSION**

THEREFORE, the U.S. respectfully submits that this Court declare that:

I. The luring of Rutaganada did not violate Canada's territorial sovereignty, the U.S.-Canada Extradition Treaty, the January 11, 1988 Exchange of Letters, and the internationally protected human rights of Rutaganda under the ICCPR and customary international law.

II. The rendition of Rutaganda from the U.S. to Rwanda would not violate international law.

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<sup>66</sup> Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36-R11bis (Oct. 8, 2008).

<sup>67</sup> Brown v. Rwanda [2009] EWHC (Admin.) 770, [40] (Eng.).

<sup>68</sup> ICCPR, *supra* note 24 at art. 14(3)(e).

<sup>69</sup> Compromis, ¶ 13(b).

